

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION**

In the Matter of

HEARST-ARGYLE TELEVISION, INC.
(WMTW TV-8)

Employer¹

and

INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES,
LOCAL 926, TELEVISION BROADCAST
STUDIO EMPLOYEES, AFL-CIO

Petitioner

Case 1-UC-835

DECISION AND CLARIFICATION OF BARGAINING UNIT²

The Union seeks to clarify an existing bargaining unit that it represents at WMTW to include the newly created position of assignment manager.³ WMTW takes the position that the assignment manager should be excluded from the unit as a statutory supervisor and/or managerial employee. I find that the assignment manager is neither a

¹ The name of the Employer appears as amended at the hearing.

² Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; and 2) the Employer is engaged in commerce within the meaning of the Act, and 3) it will effectuate the purposes of the Act to assert jurisdiction in this matter.

³ In its original petition, the Union also sought to include producers in the unit. At the hearing, the Union amended its petition to delete the proposed addition of producers.

statutory supervisor nor a manager. Accordingly, I will clarify the Unit to include the position of assignment manager.

Background

WMTW operates a television news station that has facilities in Auburn and Portland, Maine. The Union and WMTW have had a collective-bargaining relationship for many years⁴ and have signed several successive collective-bargaining agreements. The current agreement is effective from January 1, 2005 through December 31, 2007. The bargaining unit represented by the Union includes, among others,⁵ news department employees, including the titles of chief videographer,⁶ assistant chief videographer, videographer, anchor/reporter, reporter, assignment editor, assistant assignment editor, news production assistant, and news production coordinator (director). The unit as described in the parties' current collective-bargaining agreement excludes, *inter alia*, television station managers and supervisors.

In 2004, Jennifer Sullivan began to work for WMTW as a producer, a non-bargaining unit position, and she also filled in occasionally, less than 20 percent of her time, at the assignment desk.⁷ During the negotiations that led to the current agreement, the Union took the position that Sullivan appeared to be performing the same work as Assignment Editor Sharon Handy, and it sought to include her in the unit. A document prepared by WMTW for the parties' last negotiation session on April 28, 2005 indicates that the parties were not able to agree that Sullivan should be included in the bargaining unit and that the Union had reserved its right to file a UC petition over the matter.⁸

In a June 1, 2005 e-mail to newsroom staff, WMTW News Director George Matz announced that, effective immediately, Jennifer Sullivan would be the assignment

⁴ The current owner of the station, Hearst-Argyle Television, Inc., acquired the station in July 2004.

⁵ The unit also includes employees in other departments that are not at issue in this case.

⁶ The parties use the terms "videographer" and "photographer" synonymously.

⁷ From 1994 to 1996, Sullivan worked as an assignment editor for WMTW in Auburn. From 1996 to 2001 she worked as assistant news director at WMTW's Portland facility. From 2001 to 2004, Sullivan worked as the news director for an all-news radio station in Portland that WMTW had acquired. When the new owner shut down the news radio operation in 2004, she returned to the Employer's Portland location as a producer.

⁸ Although the parties had apparently reached a basic agreement as of April 28, they continued to work on "housekeeping" issues, including the updating of job descriptions, which are included in the contract. This task was completed about June 20, 2005. It appears from the contract itself that it was finally executed on August 6, 2005.

manager and would oversee the operations of the assignment desk.⁹ A week later, Matz told Handy that, effective June 27, 2005, her hours, which had been 7 a.m. to 3 p.m., were to be changed to 11 a.m. to 7 p.m. due to the creation of the assignment manager position and that Sullivan would be working from 7 a.m. to 3 p.m. On June 27, 2005, Handy filed a grievance over the change in her schedule, on the ground that there is no difference between the responsibilities of the assignment manager and the assignment editor, that the assignment manager's responsibilities represent work covered by the collective-bargaining agreement, that Handy had more seniority than Sullivan and should be entitled to the first choice of shifts, and that the creation of the assignment manager position was an attempt to circumvent Handy's seniority. On July 25, 2005, WMTW General Manager Ken Bauder denied the grievance on the ground that Sullivan's position is not covered by the contract. The Union filed the petition in this case on December 5, 2005.

THE ASSIGNMENT MANAGER'S SUPERVISORY STATUS

Newsroom operations and staff

WMTW airs daily television news shows at 6 a.m., noon, 6 p.m., and 11 p.m. Its news department has about 40 employees, with about 60 percent based in Auburn and 40 percent based in Portland.

Ken Bauder is WMTW's general manager. News Director George Matz, who is a department head, oversees newsroom operations. Matz reports to Bauder, and Assistant News Director Holly Sheppard reports to Matz. Executive Producer Erika Hammond reports to Matz and/or Sheppard, and five producers report to Hammond. About fifteen anchors and reporters, ten videographers, four meteorologists, four production assistants, and two news production coordinators also report to Matz and/or Sheppard.¹⁰

The station's assignment desk in Auburn is staffed by Assignment Manager Jennifer Sullivan, who reports to Matz and/or Sheppard, and by Assignment Editors Sharon Handy and Rebecca McNeil. Sullivan and Handy work weekdays and McNeil

⁹ It appears that WMTW had contemplated the creation of this new position since some time in 2004.

¹⁰ The parties stipulated that the news director, assistant news director, executive producer, and producers are excluded from the bargaining unit, although the record does not reveal the basis for their exclusion. I find, based on the record evidence, that News Director George Matz is a statutory supervisor, on the basis of his authority to hire employees for the newsroom and to approve their overtime.

works weekends.¹¹ Matz testified that Handy and McNeil report to Sullivan. Handy testified that she reports to Matz.¹²

WMTW asserts that the assignment manager is a statutory supervisor on the basis of her authority to assign work, responsibly direct, train, approve overtime, approve shift changes, approve time off, effectively recommend hiring, evaluate, coach, effectively recommend discipline, and adjust grievances.

Authority to assign work, responsibly direct, and train employees

Sullivan and Handy sit side by side at a group of six desks in an open area on the newsroom floor, along with the executive producer and three producers. The role of the assignment desk personnel generally is to gather story ideas and to send crews of reporters and videographers to cover them. Each day, Handy and Sullivan go through newspapers and newswires, check e-mail for press releases, check and make entries in the “daily planner,”¹³ check a scanner for news of fires or accidents, call police departments three times a day to see if there is news, check various websites for news, and take calls from viewers or reporters with story ideas. They list possible story ideas on a dry-erase board behind the assignment desk, noting in which show they might air.

Each morning around 9:15 or 9:30 a.m. there is an editorial meeting, referred to as “the morning meeting,” which is attended by the news director, assistant news director, executive producer, and assignment manager. Handy also attends the morning meeting if she arrives early enough,¹⁴ and sometimes the noon producer, a videographer, or others in the newsroom attend. The group collaboratively discusses story possibilities and determines which stories will air for the evening broadcast, what angle to pursue, and what “treatment” to give each story.¹⁵ Matz testified that everybody pitches story ideas, but that he has final authority with respect to which stories will be covered, what form

¹¹ McNeil works two days a week as a production assistant and three days a week as the weekend assignment editor. In her capacity as a production assistant, she reports to Hammond.

¹² The job description for the assignment editor position, which was incorporated into the collective-bargaining agreement along with all the other job descriptions, indicates that the assignment editor reports to the news director.

¹³ The daily planner is an electronic calendar in which the assignment desk staff note which reporters and videographers are scheduled to work that day, scheduled events such as news conferences, and stories on which they need to follow up. For example, the planner may note a scheduled court appearance in connection with a previously-reported arrest. It is also used to store background for stories that may run months later.

¹⁴ Time sheets submitted into evidence for July through December 2005 indicate that Handy arrived at work between 7 and 9 a.m. on 55 occasions during that period.

¹⁵ The story may be designated as a “reader” with no videotape, as a “graphic,” or as a “package,” which involves a reporter doing a sound track.

they will take, and who will work each story. Sullivan testified that “the managers” at the meeting often, although not always, decide which crew gets which assignment.¹⁶ Sheppard is in charge of the meeting when Matz is not available, and Hammond and Sullivan are in charge when neither of the former is available.¹⁷

After the morning meeting, Sullivan “sets up” the stories or asks the producers or assignment editors to do so. This involves making phone calls to see if a story is viable, tracking down potential interviewees and arranging interviews with reporters, and obtaining phone numbers and directions for reporters. Handy calls the reporters and videographers to give them their assignment, and sometimes Sullivan or Hammond may talk to the reporter if there are any questions. Handy testified that both she and Sullivan give assignments to reporters on a daily basis. Sullivan testified that Handy does not have authority to assign stories on her own, that she, Sullivan, sets up interviews for reporters in advance of the morning meeting, but Handy does not. Matz testified that the assignment editors give crews their assignments based on decisions the news room management team has made.

When the reporters and videographers have completed their work on a story, they call in from the field to the assignment desk to find out what their next assignment is. Whoever answers the phone, whether it is Sullivan or Handy, tells them what stories to cover next and what questions to ask.¹⁸ Reporters also call in to the assignment desk if they are lost or to report that they are running late, that a story fell through, that things are not going as planned, or that there is a problem with a story. For example, Sullivan testified that reporters may call the assignment desk to say that a judge denied them access to a jury list, to inquire whether they should identify an underage person charged with a felony, or to say that they have been thrown off property and want to know what to do next. Sullivan testified that Handy receives such calls from reporters, but she asks

¹⁶ There are four to six reporters available and eight to nine videographers, so it is possible to do four to six “packages.” Extra videographers may be sent on solo assignments that do not require a reporter.

¹⁷ Matz testified that he is unable to attend the morning meeting one to two days a week, and there was a five-month period between June and October 2005, before Sheppard was hired, that there was no assistant news director at the meeting either. He testified that now, more often than not, he or Sheppard attend the morning meeting and that it does not happen very often that neither he nor Sheppard is at the meeting. There is also an afternoon editorial meeting, at which it is apparently determined which stories will air on the 11 p.m. news show, but the record does not reveal who attends. Matz testified that he and Sheppard alternate attending the weekend editorial meetings, and that Hammond or Sullivan are in charge on the weekend if neither he nor Sheppard is available. Time sheets submitted into evidence show that Sullivan worked five weekends in 2005 since her appointment as assignment manager, but the record does not reveal whether she was “in charge” on those weekends.

¹⁸ Videographer Kevin Fowler testified that Sullivan usually participates in the assignment process in the morning, but that in the evening it is Handy who asks him if he can do a story the next day.

Sullivan or Hammond how the reporters should handle the situation and conveys the message.

McNeil became the weekend assignment editor about June 2005, and Sullivan has been training her. Sullivan goes over McNeil's plans with her on Friday and is frequently in touch with her on weekends by e-mail and phone. Handy has also helped train McNeil for the assignment editor job and came in one Saturday shortly after McNeil had been hired to train her, as McNeil was not yet ready to work the desk by herself. McNeil has called Handy on weekends with questions.

In the summer of 2005, Sullivan created a list of tasks for McNeil, although Sullivan testified that the list of tasks also applies to Handy's job. Handy contributed to the production of the list of tasks. The list states that the assignment editors are to check voice mail messages, e-mail messages, wires, various websites, and daily newspapers for story ideas and breaking news, to do beat checks at least twice during their shift, and put stories on the assignment board.¹⁹ The list states that the assignment editors are to make assignments following the conference call, keeping in mind that it is crucial to keep a crew in the greater Portland area in the event of breaking news, although the assignment editors should roll the crew if there is a major story outside that area, and should consult the meteorologist and producer about whether to put a crew on a weather story. The assignment editors are to enter the governor's schedule for the next week into the planner and leave a note for the next assignment editor outlining what needs to be done, e.g. follow-up to a story or coverage of a court appearance for someone arrested over the weekend. The list states that the assignment editors are to check with a manager before bringing in anyone early. Apart from the tasks on the list, Sullivan has asked Handy to do reports about what stories air on competitor stations from 5 to 6:30 p.m.

Authority to approve schedule changes, time off, and overtime

Handy is responsible for scheduling the videographers, reporters, and anchors for their shifts and making sure there is coverage for each shift.²⁰ She meets with Matz once or twice a week to review scheduling matters, and he clears any anchor assignments. Sullivan testified that she frequently reviews the schedules set up by Matz to make sure there are no gaps. On December 1, 2005, Sullivan e-mailed Matz that there were only two reporters scheduled for the day shift on December 7 and suggested bringing in one of two reporters. Matz replied that he was fine with it if one of the two reporters were available and that otherwise they would go with what was scheduled. Sullivan replied to Matz that she also thought it would be wise to line up an extra reporter for the day shift on December 8, but the record does not reveal his response.

¹⁹ The list notes that the assignment editors might have to decide whether to shift crews onto breaking news or go with what is laid out in the planner, that they should not be afraid to make changes, and that they should call a manager if they are not sure which route to take.

²⁰ Sullivan testified that Handy is responsible for the clerical aspects of scheduling.

Sullivan testified that on three occasions she changed the hours of Handy's scheduled shift to 7 a.m. to 3 p.m. so that Handy could cover for Sullivan when Sullivan had to be out of the newsroom. In October 2005, Sullivan changed the time of Handy's shift without requesting approval from Matz so that Sullivan could attend a work-related meeting. An e-mail message indicates that Sullivan asked Matz's permission to swap shifts with Handy twice in November 2005, so Sullivan could go to a medical appointment. Sullivan testified she needs Matz's permission to change her start time or Handy's start time during the ratings periods, which fall in February, May, July, and November, and that she does not need his approval outside the ratings periods.

Handy testified that since the change in her hours, she and Sullivan have asked one another to swap shifts from time to time, less than once a week. At first, they would simply ask one another and did not seek approval from Matz. At some point in 2005, Matz issued a memo indicating that there had been a problem with videographers swapping shifts and that he wanted to approve all shift swaps. Handy took the memo to refer to all shift swaps, not just those by videographers. Since then, Matz has approved or denied her requests to swap shifts with Sullivan. A December 18, 2005 e-mail exchange shows that Handy asked Sullivan to swap shifts on three days in January, and Sullivan responded that she could swap on any of those dates as long as Matz was OK with it.

Matz approves requests for time off. Sullivan testified that she is asked to review requests for time off by the assignment editors and occasionally those of other employees. She testified that if she says there is no problem, Matz approves the request, and if she sees a conflict and says no, Matz signs off on it. She gave no specific example of any instance in which she recommended denial of a request for time off and Matz accepted her recommendation. WMTW submitted into evidence one request by McNeil for two vacation days. Sullivan testified that Sheppard asked her if it would be okay. Sullivan sent a note to Sheppard showing who else was working that day, with a question mark as to one person. Sullivan testified that she discussed the matter with Sheppard because there was a question as to whether one of the reporters would be working in the field or in the newsroom that night, which would affect the approval of McNeil's request. The record does not reveal whether or not Sullivan ultimately recommended that the request be approved, and Sullivan testified that she did not know the result. Handy testified that she submits her vacation requests to Matz, who approves them, but she did not know if Matz consults with Sullivan about them.

Matz testified that Sullivan has authority to approve overtime for anyone in the newsroom, that she uses her judgment regarding the circumstances, and that she approves overtime at least a couple of times a week.²¹ Matz testified that he may approve overtime

²¹ The Union introduced into evidence several weeks' worth of weekly time sheets completed by employees, along with an attached sheet on which employees note their "Overtime Explanation," if applicable. Matz signs both the time sheet and overtime explanation sheet each week. Matz testified that the fact that he signs these documents after the fact does not necessarily indicate that he was the person who actually approved the overtime beforehand.

with respect to situations that he knows are coming up, but Sullivan approves it in cases such as breaking news. In this regard, Sullivan may call a reporter or photographer, or ask Handy to do so, to ask them to come in early or stay late to work on a story. Chief Videographer Steve Jacobs testified that if Sullivan calls to ask him to come in early for a story, and he is unavailable, she will go to the next videographer who is available, and that Sullivan has never directed him to come in early when he was not available.

Jacobs testified that Handy has also asked him to come in early and stay late. Handy testified that if she knows in advance about the need for overtime she asks Matz for his approval, or Sullivan may ask her to call someone in early. If there is breaking news that would require overtime, and there is no time to obtain the necessary approvals, Handy testified that she sends a reporter and videographer to cover the story, since it is her understanding that the station would want her to cover breaking news. Matz testified that Handy would ask him, Hammond, Sheppard or Sullivan to approve overtime for a breaking story and could not think of an instance where she had done this without prior approval.

Sullivan testified that she has assigned overtime to Handy without approval by Matz. In this regard, she testified that she has asked Handy to come in early or stay late on a busy news day. Handy testified that she stays late when needed, for example, if a press release arrives late in afternoon or there is breaking news, and that she has done so at times without seeking approval. Sometimes Matz has asked her to stay late, and she testified that she would probably ask Matz if her staying late would involve a substantial amount of overtime. Handy did not recall Sullivan ever asking her to work late and did not recall ever seeking approval from Sullivan to work overtime. Finally, Sullivan testified that she can and does work overtime herself without approval from Matz.

Authority to effectively recommend hiring and promotions

Matz makes the hiring decisions for the newsroom. From time to time, he has asked Sullivan to interview job applicants, watch their live auditions, or review their resumes and audition tapes, and then make a recommendation. He testified that he also tries to get input from Hammond and Sheppard regarding candidates.

Sullivan interviewed four candidates for the position of assistant news director. She made a recommendation against three of them, and the candidate she recommended to Matz, Holly Sheppard, was hired. All of the candidates for assistant news director were also interviewed by Matz and Hammond. With respect to candidate Jennifer Hardy, who was not hired, Matz noted his own impressions on her resume and testified that "None of us felt she would bring the right chemistry to the room."

Sullivan observed two live auditions for an anchor position. WMTW General Manager Ken Bauder watched Catherine Anne Pegram's audition along with Sullivan. They both noticed that she had a facial tic, and Sullivan told that to Matz, who did not hire her. With respect to anchor candidate Sue Turner, Matz testified that he talked with both Sheppard and Sullivan about her audition. Sullivan told Matz that Turner's audition

was flat, and he did not hire her. The record does not reveal whether Matz watched the audition, too, or what Sheppard's recommendation was.

Sullivan made recommendations to Matz with respect to five candidates for reporter positions. Sullivan testified that Matz, Hammond, and Sheppard would be "involved" in consideration of candidates for reporter positions.²² Sullivan reviewed the resume and audition tape of Andy Choi, and Matz interviewed Choi twice on the phone. Sullivan reviewed the resume and audition tape of Danielle Strauss and also interviewed her. Choi and Strauss were applying for the same opening for a reporter. Sullivan told Matz they were both very good or terrific, but Matz testified that he did not hire either of them, because he preferred to find someone with a little more experience. Matz did not hire anyone right away for that opening. He later hired reporter Michelle Frey, who was interviewed by Matz, Sheppard, Hammond, and Sullivan. Sullivan agreed that Frey had had a good audition and told Matz that she was impressed by her.

Sullivan also reviewed the resume of Joe Arena for a reporter position and watched his live audition from Auburn, while Matz watched the audition in Portland. Sullivan told Matz that Arena's audition was rough, and Matz did not hire him. Matz testified that he relied on Sullivan's recommendation. Finally, Sullivan did not interview candidate James Keithly, but Matz asked her opinion of him for a reporter position, because she had worked with Keithly at the station previously for several years. Sullivan told Matz that she had mixed feelings about Keithly and gave him a mixed review. Matz also asked Handy and a few others who were familiar with his work for their opinions, although the record does not reveal what their recommendations were. Matz hired Keithly.

Sullivan interviewed candidate Melissa Green for a position as noon producer. Sullivan told Matz that she did not think Green had the best experience, and he decided to wait for someone with more experience. The record does not reveal whether anyone other than Sullivan interviewed Green as well. Matz asked the opinions of both Hammond and Sullivan as to whether he should promote production assistant/weekend assignment editor Michael Knack to the position of producer. Sullivan gave him a strong recommendation, and Matz promoted him.

Matz asked Sullivan her opinion about hiring videographer Don Seavey, whom Sullivan had supervised previously for a number of years. Sullivan urged Matz not to hire Seavey, and he was not hired. Matz also asked Handy for her opinion of Seavey, since she had previously worked with him at the station, as well.²³ Matz has also asked Chief Videographer Steve Jacobs and Videographer Kevin Fowler, who are in the bargaining unit, to interview applicants for videographer positions and to review tapes submitted by them.

²² Handy testified with respect to Sullivan's role in interviewing in general that job candidates would meet with Matz before being interviewed by Sullivan.

²³ The record does not reveal Handy's recommendation.

Authority to evaluate and coach

Matz testified that he completed an evaluation of Handy on June 13, 2005, because, at that time, Sullivan had been Handy's supervisor for only two weeks. Matz asked Hammond and Sullivan for verbal input in preparing it, and Sullivan signed it, as well as Matz and the general manager. Matz testified that Sullivan will do Handy's evaluations in the future. The evaluation form used in Handy's evaluation indicates that the evaluator rates the employee on a scale from one to five with respect to various criteria. There is no evidence that the ratings have any impact on employees' salaries or job status. The collective-bargaining agreement establishes the hourly rates for each bargaining unit job, and an employee profile submitted into evidence indicates that Handy's salary was raised effective January 1, 2005 "per union contract."

Sullivan testified that she does not consider herself to be the supervisor of the videographers. Nonetheless, Matz asked her to evaluate them, and she wrote a few sentences commenting about the performance of each of ten videographers in an e-mail to Matz on July 21, 2005. She testified that she does not know whether her input resulted in any change to their evaluations. Chief Videographer Jacobs testified that the prior news director asked him to submit a pre-evaluation of videographers, which the news director would agree with or change. In the fall of 2005, Matz asked Jacobs to provide his thoughts about the videographers for evaluations, which he did, in a document similar to the one submitted by Sullivan.

Sullivan has coached employees about their performance. In November 2005, she gave McNeil written feedback about her performance.²⁴ On November 22, 2005, Sullivan e-mailed some coaching tips to a reporter who had misspoken during a live shot about a sentencing hearing.

Authority to discipline

Sullivan testified that Matz makes determinations with respect to discipline and terminations, but that she has authority to recommend discipline with respect to any employee in the news department. On December 27, 2005, Sullivan e-mailed Matz that McNeil had called in sick less than three hours before the start of her shift as a production assistant and in advance of two days off, and that it struck Sullivan that there was a pattern of McNeil calling in sick just before or after her weekend. Sullivan did not make any recommendation for discipline in the e-mail, although she testified that she has recommended to Matz that he reconsider McNeill's continued employment as weekend assignment editor. Sullivan testified that action is being contemplated, but that McNeil had received no discipline as of the date of the hearing.

²⁴ Sullivan testified that she has expressed concerns that McNeil is in over her head and needs more experience.

On December 26, 2005, Sullivan e-mailed Matz that Videographer Joe Chabot had called in sick and that, as a result, the station did not get a certain story. The same day, Sullivan e-mailed Matz to confirm that she had left a message for Chabot asking him to bring in a doctor's note to explain his absence. There is no evidence that Sullivan made any recommendation for discipline of Chabot, although she testified that it was her understanding that discipline of Chabot was pending.

Sullivan has had discussions with Handy regarding occasional job deficiencies or errors, such as failing to follow up on a story or failing to schedule a videographer to shoot a story. Sullivan testified that she did not regard these discussions as reprimands.

Authority to adjust grievances

The collective-bargaining agreement states that all grievances not resolved by an immediate supervisor must be presented in writing to the department head. There have been three grievances filed in the newsroom since Sullivan became assignment manager. Handy filed a written grievance with Matz concerning the change in her hours and did not discuss the matter with Sullivan prior thereto. There have been two other grievances since Sullivan became assignment manager, one concerning reporter or videographer schedules and one concerning the right of all newsroom employees to wear hats of their choice. Sullivan did not play any role in the meetings over these grievances.

Secondary indicia

Both Handy and Sullivan are hourly paid,²⁵ sign timesheets, and receive overtime pay. Sullivan's base pay works out to \$41,850 on an annual basis, while Handy's base pay is \$34,382. The base pay of Chief Videographer Jacobs is \$45,260. Sullivan participates in a pension plan that is available only to non-bargaining unit employees, and her entitlement to holidays and personal days is governed by WMTW's policy for non-bargaining unit employees, which is slightly different from the entitlement of bargaining unit employees.²⁶ Otherwise, Sullivan's benefits are the same as those of the bargaining unit employees. Neither Sullivan nor Handy has an office and sit in the same "pod" of desks with Sheppard, Hammond, and others. Matz has an office.

According to a description of Sullivan's duties issued by Matz, Sullivan may be put in charge of the newsroom along with the executive producer, in the absence of the news director or assistant news director. Sullivan is one of the "managers" who take turns being on call on the weekends. Handy, in contrast, has no formal weekend responsibilities.

²⁵ Matz testified that he considers Sullivan to be a salaried employee, but he also testified that she has a set hourly rate and receives overtime pay.

²⁶ Non bargaining-unit employees receive two more paid holidays and one less personal day off than bargaining unit employees.

Sullivan testified that Matz holds weekly meetings with the “management team,” composed of the assistant news director, executive producer, and assignment manager. In these meetings, they do “strategic planning.” For example, they have discussed whether stories from other Hearst-Argyle affiliates would be worth pursuing in their market, how to make the best use of WMTW’s partnership with a company that publishes three Maine newspapers, and cross-promotion with the company that bought some radio stations formerly owned by WMTW. Sullivan also meets alone with Matz five to ten times a week to discuss issues such as personnel matters, staffing, content, enterprise stories, long-term planning, and budget issues. In November 2005, the news room employees were required to take a 45-minute on-line training course regarding workplace harassment. Matz directed Sheppard, Hammond, and Sullivan to take a 90-minute version of the workplace harassment training that is intended for managers.

Conclusion regarding supervisory status

Pursuant to Section 2(11) of the Act, the term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.*²⁷ The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. *Quadrex Environmental Co.*²⁸

The Board and the courts have held that the burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Kentucky River Community Care*.²⁹ WMTW argues that, because Sullivan had been performing her new responsibilities for only a few months at the time of the hearing,³⁰ and WMTW has demonstrated that she has supervisory authority on paper, the burden should shift to the Union to prove that she cannot exercise any of those authorities. WMTW cites no case law for the proposition that the burden of proof shifts in those circumstances, and I find, in accordance with well-established precedent, that the burden of proving Sullivan’s supervisory status rests squarely with WMTW. The fact that Sullivan has only held the position at issue for a few months, however, is a factor that may be considered in determining whether her failure to have exercised any of the authorities in dispute means

²⁷ 273 NLRB 1677, 1689 (1985).

²⁸ 308 NLRB 101, 102 (1992).

²⁹ 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

³⁰ The hearing took place on January 11, 12, and 18.

she does not actually possess that authority or that she has simply not yet had the opportunity to do so. See *Tesoro Petroleum Corp.*³¹

As indicated above, WMTW asserts that the assignment manager is a statutory supervisor on the basis of her authority to assign work, responsibly direct, train, approve overtime, approve shift changes, approve time off, effectively recommend hiring, evaluate, coach, effectively recommend discipline, and adjust grievances.³² I find that WMTW has failed to establish Sullivan's supervisory status.³³ I note at the outset that the fact that Sullivan was given the title of "manager" does not demonstrate her supervisory status; as the status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification. *New Fern Restorium Co.*³⁴ *Hallandale Rehabilitation and Convalescent Center.*³⁵

WMTW has failed to establish that Sullivan exercises independent judgment in giving assignments to reporters and videographers and in directing their work. First, it appears that most of these assignment decisions are made at the editorial meetings at which the news director has final authority to assign stories and/or that assignment decisions are made collaboratively by Matz, Sheppard, Hammond, and Sullivan. *KGW-TV*³⁶ (assignment editor is not a supervisor, where assignment of stories at a TV news station is a collaborative effort on the part of all involved, particularly those assignments made as a result of the daily planning meetings).³⁷ Second, assuming that Sullivan,

³¹ 192 NLRB 354, ALJD at 359 (1971).

³² Although only the assignment editors report directly to Sullivan, WMTW appears to take the position that she also has supervisory authority over the reporters and videographers.

³³ Citing *Detroit College of Business*, 296 NLRB 318 (1989), and *Union Square Theater Management, Inc.*, 326 NLRB 70, 72 (1998), WMTW asserts that the relevant test for the significance of supervisory authority is whether the performance of supervisory duties is "part and parcel of the individual's 'primary work product' rather than an ancillary part of their duties." Since those cases involved the standard to be applied when the individual whose status is in dispute exercises authority over non-bargaining unit personnel, which is not the case here, I do not rely on them.

³⁴ 175 NLRB 871 (1969).

³⁵ 313 NLRB 835, 836 (1994).

³⁶ 329 NLRB 378, 382 (1999).

³⁷ Citing *Multimedia KSDK, Inc. v. NLRB*, 303 F.3d 896 (8th Cir. 2002), WMTW asserts that the Board's decision in *KGW-TV*, holding that assignment editors did not exercise independent judgment in assignment or direction of employees because they were part of a collaborative news team, is in conflict with the Supreme Court's decision in *Kentucky River*, supra. I note that in an earlier decision in the case, 271 F.3d 744 (8th Cir. 2001), the Eighth Circuit upheld the Board's decision that KSDK's producers and assignment editors were not supervisors and that in the subsequent case cited by WMTW, KSDK challenged only that portion of the panel's decision regarding the producers. Even assuming that the later case has any applicability to the

unlike Handy, actually does assign stories to reporters and videographers on her own, there is no record evidence as to the basis for her decisions to assign a story to one person versus another. Merely having authority to assign work does not establish statutory supervisory authority, and the Board must distinguish between the exercise of independent judgment and the giving of routine instructions. See *KGW-TV*, in which the Board found that assignment editors did not exercise independent judgment although they were free to initially designate reporters and photographers to cover a story.³⁸

Sullivan's authority to ask reporters, videographers, and assignment editors to work overtime by coming in early or staying late to cover a story does not confer supervisory authority in the absence of evidence that the overtime work is mandatory. *Harborside Healthcare, Inc.*³⁹ (charge nurses are not statutory supervisors where they have no authority to require employees to come in to work, but are limited to seeking volunteers). Nor has WMTW submitted any evidence with respect to the process by which Sullivan selects reporters or videographers for overtime. *Crittenton Hospital*.⁴⁰ Finally, Sullivan's authority to approve her own overtime does not demonstrate supervisory authority over others. *Washington Nursing Home, Inc.*⁴¹ (charge nurse's authority to stay late in order to complete paperwork, earning overtime, without the approval of her own supervisor does not indicate supervisory authority over others); *J/B Industries, Inc.*⁴² (individual who enjoyed authority to work overtime as required by her workload was not a supervisor).

supervisory status of assignment editors, the Eighth Circuit concluded that the Board's finding that the producers were not supervisors rested on the ground that they used judgment stemming from their own experience, skills, training, or position, which conflicted with the Supreme Court's holding in *Kentucky River* that the Board could not find a lack of independent judgment merely because the judgment was based on professional or technical skill or experience. The majority did not address any alternative theories upon which the Board might have relied in finding the producers not to be supervisors and did not, as WMTW suggests, challenge or even address the Board's theory concerning collaborative news teams.

³⁸ *Id.* In *KGW-TV* the designation of reporters and photographers was based on their known backgrounds and specific skills, availability, and/or regular beats, previous similar assignments, the need to have a fast-breaking story covered immediately, requests for a particular photographer by a reporter, whose idea the potential story was, and sometimes simply the next individual in rotational order. The Board found that such assignments, based on known skills or to equalize workload on a rotational or other rational basis, did not require the use of independent judgment.

³⁹ 330 NLRB 1334, 1336 (2000).

⁴⁰ 328 NLRB 879 (1999).

⁴¹ 321 NLRB 366, ALJD at 370 (1996).

⁴² 225 NLRB 162, ALJD at 169 (1976).

It does not appear, as WMTW argues, that Sullivan has authority to change Handy's hours without approval by Matz. Sullivan conceded that she needs Matz's permission to do so during the four months that occur during the ratings periods. Although Sullivan changed Handy's shift once in October 2005 without seeking permission, Handy testified that the two of them often asked one another to swap shifts without asking Matz, until he issued the memo indicating that he wanted to approve all shift swaps. Thereafter, in December 2005, when Handy asked Sullivan to swap shifts on three days in January (which does not fall within a ratings period), Sullivan replied that she could swap as long as Matz was okay with it. Nor does it appear that Sullivan has authority to schedule extra staff to work without approval by Matz; the record reveals only that on two occasions she suggested to Matz that they schedule an extra reporter, and on one of those two occasions he agreed with her suggestion.

Sullivan's role in reviewing requests for time off does not confer supervisory status. First, Matz must approve all time off requests. *Esco Corp.*⁴³ (warehouse supervisor who has some discretion in granting time off is not a supervisor, since his decisions are subject to management oversight, if not approval). Nor can it be said that she effectively recommends the approval of time off, since there is no record evidence of any specific instance in which Sullivan recommended the denial of an employee's request and Matz thereafter accepted her recommendation. The only evidence of her review of any specific request for time off involves an incident in which McNeil requested two vacation days and Sullivan subsequently discussed the matter with Sheppard. Since the record reveals neither Sullivan's ultimate recommendation nor whether her recommendation was followed, Sullivan's role in reviewing McNeil's request for time off cannot form the basis of a supervisory finding.

I also conclude that Sullivan's role in the hiring and promotion process does not constitute effective recommendation of those actions. WMTW essentially presented evidence that, on numerous occasions, Sullivan participated in the hiring process by reviewing resumes, interviewing applicants, and/or watching live or taped auditions,⁴⁴ and that Matz made a decision that was consistent with Sullivan's recommendation. However, the Board has made it clear that authority effectively to recommend means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation was ultimately followed. *Children's Farm Home*.⁴⁵ Where supervisors interview the applicants themselves or otherwise independently investigate their suitability, it cannot be said that the employees whose status is at issue

⁴³ 298 NLRB 837, 839 (1990).

⁴⁴ I note that Matz has also asked Videographers Jacobs and Fowler to interview applicants for videographer positions and review their tapes.

⁴⁵ 324 NLRB 61 (1997).

effectively recommend hiring. *Ryder Truck Rental, Inc.*;⁴⁶ *California Beverage Co.*⁴⁷ Here, it appears that Matz and other superiors routinely observe auditions themselves and interview candidates themselves. For example, Matz and Hammond interviewed all four candidates for assistant news director, and it appears that Matz interviews all candidates for reporter positions. Bauder watched one audition for an anchor position, Sheppard watched another, and Matz watched Arena's audition for a reporter position. Further, Matz does not invariably follow Sullivan's recommendations, as he rejected her recommendations to hire Choi and Strauss for reporter positions and hired Keithly notwithstanding a mixed review by Sullivan.

The Board has found that authority to "evaluate" is not a Section 2(11) authority, so that when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing the evaluation will not be found to be a statutory supervisor. *Willamette Industries, Inc.*⁴⁸ Here, the wages of the bargaining unit employees are established by the collective-bargaining agreement rather than by evaluations, and there is no evidence that evaluations have any other effect on employee job status. Thus, the fact that Sullivan will complete Handy's annual evaluation in the future or that she has given input into the evaluations of the videographers cannot, without more, transform her into a Section 2(11) supervisor. I note, in any event, that there is no evidence as to how her input was used, if at all, in the videographers' evaluations.

Coaching and training employees is not a supervisory function. *Sears, Roebuck and Co.*⁴⁹ (senior experienced employee who instructs new workers is not a supervisor); *F.A. Bartlett Tree Expert Co., Inc.*⁵⁰ (crew foremen who provide on-the-job training to trimmers are not supervisors). Thus, Sullivan's role in training McNeil, such as preparing a list of tasks for her to perform on the weekend, and in giving tips to reporters, does not constitute supervisory authority.

The record does not substantiate WMTW's assertion that Sullivan has authority effectively to recommend discipline. In the six months since she has been in her new role as assignment manager, it appears that Sullivan was involved in two disciplinary incidents. In one instance, Sullivan notified Matz that a reporter had called in sick so that the station had missed a story. Assuming the incident may result in some discipline, which had not yet occurred at the time of the hearing, there is no evidence that Sullivan made any recommendation for discipline to Matz. In a second instance, Sullivan e-

⁴⁶ 326 NLRB 1386, 1387 fn. 9 (1998).

⁴⁷ 283 NLRB 328, 329 (1987).

⁴⁸ 336 NLRB 743, 743-744 (2001).

⁴⁹ 292 NLRB 753, 754 (1989).

⁵⁰ 325 NLRB 243 fn. 1 (1997).

mailed Matz of her concern that McNeil was abusing sick leave and testified that she recommended to Matz that he reconsider McNeil's continued employment as weekend assignment editor. Sullivan's testimony that some action is currently being contemplated is insufficient to demonstrate that her recommendation has resulted in or will result in any discipline, or that Matz has followed or will follow Sullivan's recommendation without conducting an independent investigation.

Sullivan's role in bringing job deficiencies or errors to Handy's or McNeil's attention does not demonstrate statutory authority to discipline. Sullivan testified that she, herself, did not view these discussions as reprimands. In any event, even if they were to be construed as verbal reprimands, mere authority to issue verbal reprimands is too minor a disciplinary function to constitute statutory authority. *Ohio Masonic Home, Inc.*⁵¹

The record does not support a finding that Sullivan has any authority to adjust grievances, where she played no role in responding to any of the three grievances that have arisen in the newsroom since she became the assignment manager.

Finally, Sullivan does possess some secondary indicia of supervisory status, in that she receives different benefits from bargaining unit employees, she and the executive producer may be in charge of the news room in the absence of the news director and assistant news director, she attends "management" meetings, and she took the version of the workplace harassment training that is intended for managers. Secondary indicia, however, are insufficient by themselves to establish supervisory status when there is no evidence presented that an individual possesses any one of the several primary Section 2(11) indicia. *Ken-Crest Services*.⁵²

Accordingly, I conclude that Sullivan is not a supervisor within the meaning of the Act.

THE ASSIGNMENT MANAGER'S MANAGERIAL STATUS

Matz testified that, as compared to the assignment editor, the assignment manager plays a larger role in deciding news content and what stories the station will cover and that she is independent in that she can make her own decisions about content. He testified that he discusses policy issues with Sullivan, such as editorial issues, news gathering, whether the staff followed proper procedures in gathering news, and strategy issues. As noted above, there are occasions when Sullivan is in charge of the morning meeting at which it is determined which stories will be covered, sometimes along with Hammond, but this does not occur very often.

⁵¹ 295 NLRB 390, 394 (1989).

⁵² 335 NLRB No. 63, slip op. at 3 (2001).

Sullivan testified that she spends 30 to 40 percent of her time performing duties similar to those performed by Handy. She testified that she spends the rest of the time on “managerial” duties. Among those duties are long-range planning, the management of continuity between newscasts, and the development of “enterprise” stories. Her responsibility for long-range planning and continuity involves going through the daily planner every day and moving those stories forward that need to be revisited at a later date, such as the anniversary of an event or a follow-up story. For example, Sullivan may note in the planner that the station should revisit one year later a story about Maine soldiers killed in Iraq to see how the lives of their families have changed, or that WMTW should update a story about criminal charges in the event, for example, that the charges are later dropped.

Sullivan, along with Hammond and Sheppard, is responsible for the development of a 52-week plan for enterprise stories. Enterprise stories are stories other than breaking news stories that are developed exclusively by WMTW. The stories may involve problems or issues in a community, medical issues, or investigations. For example, WMTW has reported on enterprise stories concerning a family with cancer, a disabled child who was harassed at school, camera phones, identity theft and other scams, the usefulness of cough syrups, and the outsourcing of radiology readings to India. Sullivan obtains ideas for enterprise stories, *inter alia*, from the internet, from a school of journalism that sends out a daily list of story ideas, and by cultivating other contacts. She must submit story ideas to the assistant news director and news director. Reporters or anyone in the newsroom can develop enterprise stories; Handy and Jacobs have both pitched stories to Matz, some of which were used and some of which were not used. Matz testified that he expects Sullivan to suggest numerous stories for the enterprise plan and to play a direct role in developing many of the stories.

Sullivan testified that for one enterprise story, she negotiated with the state police and their attorney to obtain the release of a videotape of a high-speed chase and shooting, which resulted in an exclusive story for the station. The record does not reveal what the negotiations entailed. Handy testified that sometimes the newsroom must agree to certain things in order to get a story and that, if it involved a policy issue, she would not make an agreement without Matz’s approval.

Reporters’ scripts must be proofread and approved before they record the sound track. This task is typically performed by a producer or the executive producer, but Sullivan approves scripts if a producer is not available and frequently writes scripts herself.⁵³ Sullivan testified that Handy rarely writes scripts and cannot approve scripts.

Both Sullivan and Handy write “topicals,” a 15-second “tease” designed to promote an upcoming news story so that viewers will watch the newscast. Sullivan testified that if she is producing a news show, she will ask Handy what stories might be suitable for a topical, and Handy gives options, but does not decide, whereas Sullivan

⁵³ Reporter Lisa Gardner testified that 95 percent of the time, Hammond or the 6 p.m. producer approves her scripts.

may determine which story gets topical treatment. Sullivan testified that Handy drafts topicals, but that they must be approved by a manager or producer, including Sullivan; Handy testified that she did not know if a manager must approve her topicals and that she has written them without Sullivan's approval.

Sullivan participated in planning for WMTW's November 2005 election coverage. In this regard, she and the other news managers met to discuss election coverage, and Matz asked Sullivan to list for him the races and referenda that the station should cover. Sullivan e-mailed to Matz an "election plans draft," listing the various races, the locations of the gatherings of supporters, a designated reporter and videographer for each gathering, and whether a satellite or microwave truck would be used. The record does not reveal Matz's response. Thereafter, Sullivan e-mailed an election night plan with much the same information to the newsroom staff and engineering departments.

Handy testified that she played much the same role for WMTW's 2002 and 2003 election coverage. She called the various candidates and campaigns to find out where they were gathering on election night, so the station could plan where to send trucks for live coverage. Then she met with the former news director and Hammond, and they decided collectively which races the station would cover and to which gatherings they would send a satellite truck for live coverage.

Sullivan testified that she is involved in strategic planning at WMTW. In this regard, as noted above, she discusses with Matz whether stories from other Hearst-Argyle affiliates would be worth pursuing in their market. She has discussed with Matz the best way to make use of a partnership established with a company that publishes three Maine newspapers, so that WMTW will get the most traffic on its website and TV newscast. She has also talked with Matz about cross-promotion with a company that bought the radio stations formerly owned by WMTW.

Sullivan participated in an exchange with Matz regarding which companies' stock prices should be included in WMTW's nightly stock report. A company had requested that its stock be listed, and Matz asked Sullivan for feedback on the request and how the nightly stock report is compiled. Sullivan e-mailed Matz that it might be a good time to establish clear criteria for inclusion. She noted an inconsistency in the selection of included stocks and told Matz he might want to consider using the top ten list established by a Maine business magazine, which is based on the number of employees in Maine and annual payroll in Maine. The record does not reveal whether Matz implemented Sullivan's recommendation.

Sullivan is responsible for replying, on behalf of WMTW, to e-mail messages from viewers. Sullivan estimated that she had replied to over 1000 such e-mails. The following examples of such e-mail exchanges were submitted into evidence: A viewer asked if the station knew of any groups that deliver Christmas trees to families in need, and Sullivan replied that she was not aware of any, but suggested some organizations the viewer might contact. A viewer asserted that the station's report that employees laid off

from a company had been given severance pay was inaccurate. Sullivan replied that it was possible the checks were forthcoming and that the station would contact its source again to inquire. A viewer asked for information about a possible comet or meteor she had seen. Sullivan asked for details, suggested that it might have been a meteor shower, and referred the viewer to a NASA website and the Maine Nature News website. A viewer asked why the station did not include the stock price of a large Maine company in its nightly broadcast. Sullivan replied that WMTW was limited in the number of stock quotes it could broadcast each evening, that the station periodically edits the list based on viewer interest and changes in the business climate, and that the station would keep the viewer's comments on file for the next time the list was reviewed.

Sullivan is the newsroom's liaison with WMTW's website. In this regard, she works with the managing editor of the website to ensure that news content gets to the website and that journalistic standards are met. Sullivan attends a weekly meeting with the website editor, Matz, and the head of "Creative Services" to discuss the interaction between the two media. In August of 2005, this group met with WMTW General Manager Ken Bauder and a vice president of Hearst-Argyle to discuss the future of the website and to consider the website as a platform for breaking news, rather than as a medium to report the TV news. The record does not reveal Sullivan's role in these discussions or the result of the meeting.

Sullivan was appointed by the Maine Supreme Court, as a representative of television stations in the Portland market, to a term on the Media and the Courts Committee. The record does not reveal anything more about the mission of the Committee or Sullivan's role in it.

Sullivan does not have a company credit card, but Matz testified that she is authorized to make purchases without his approval to a minimal degree. Matz testified that Sullivan and Hammond recently discussed whether to send a satellite truck as opposed to a regular truck to cover a story and decided to send the satellite truck. Use of the satellite truck as opposed to a regular truck required overtime, higher fuel costs, plus a charge for satellite time, although the record does not reveal the amount of the extra costs.⁵⁴ A satellite truck costs up to \$250,000, but there is no evidence that Sullivan played any role in its purchase. Matz testified that on a recent election night, Sullivan made the decision to commit WMTW funds to install telephone lines and risers.⁵⁵

⁵⁴ Satellites have transponder space that is owned by various companies, and Hearst-Argyle owns a portion of the transponder space on the satellite most often used by the station. Matz testified that WMTW is assessed by Hearst-Argyle with an intra-company charge for using the satellite, a fixed charge, the amount of which is not revealed by the record, plus \$35 for five minutes, if the station uses time beyond the time in Hearst-Argyle's inventory.

⁵⁵ Chief Videographer Steve Jacobs testified that he did a site survey of technical needs in covering the election results of a referendum campaign, which he is sometimes asked to do by Matz, Sullivan, or Handy. He recommended the use of risers and signed for them when they arrived.

Sullivan also mentioned in an e-mail that dinner would be delivered for the staff, but Matz testified that he had to approve payment for the food.

Sullivan is in charge of WMTW's storm closing system, under which schools and other organizations report weather-related closings and delays for broadcast by the station and posting on its website. She maintains a data base of participating organizations, which has been expanded from 1000 to 2000 organizations under her tenure, and sends them an annual letter with instructions for using the system. She wrote a memo to the staff outlining how the system is to be used,⁵⁶ revamped the way the information is displayed on television, worked with the "MaineToday.com" website to make sure the information is properly displayed on the website, and did computer tests on the website.⁵⁷

Conclusion regarding managerial status

Managerial employees are defined as those who formulate and effectuate management policies by expressing and making operative the decisions of their employer. They must exercise discretion within, or even independently of, established employer policy and must be aligned with management. Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy. *Allstate Insurance Co.*⁵⁸ The party seeking to exclude individuals as managerial has the burden of coming forward with evidence necessary to establish such an exclusion. *Lemoyne-Owen College*,⁵⁹ *Montefiore Hospital & Medical Center*.⁶⁰

I find that WMTW has failed to meet its burden of establishing the assignment manager's managerial status. WMTW asserts that Sullivan is a managerial employee in part because of her role in the development and selection of news content. It relies, for example, on Sullivan's role in the morning meeting where it is determined which stories will be covered, on her role in long-term news gathering and story development, on her

⁵⁶ The memo states, for example, that Sullivan tweaked the system to add new categories for types of organizations, that the system will not be activated until the station has received notice of five closings, and that staff should use their judgment in deciding to air cancellations from callers who are not currently in their system and do not have user codes and passwords. Handy testified that webmaster John Olore, who was previously responsible for the system, sent out a similar letter the prior year.

⁵⁷ Handy has also worked on the storm closing data base, but Sullivan testified that her role was different in that it was limited to taking calls from organizations that wanted to participate, and sending them a user code, password, and instructions.

⁵⁸ 332 NLRB 759, 762 (2000), citing *NLRB v. Yeshiva University*, 444 U.S. 672, 682-683 (1980).

⁵⁹ 345 NLRB No. 93, slip op. at 6 (Sept. 30, 2005).

⁶⁰ 261 NLRB 569, 572 fn. 17 (1982)

responsibility for developing a 52-week plan for enterprise stories, on her responsibility for continuity, on her role in ensuring that news content is published on WMTW's website and that the website meets journalistic standards, on her role in discussing with the "management team" whether stories aired by other Hearst-Argyle affiliates would be worth airing in the WMTW market, on her role in recommending which races should be covered on election night or which stocks should be listed in the nightly business report, and on her authority to approve scripts and topicals for broadcast.

The Board has held, however, that decisions as to 1) the newsworthiness of a news story or 2) the actual placement of a story within the news section of a newspaper are not the types of "policy" decisions that mark the maker as a managerial employee. "Rather, such decisions reflect a purely journalistic judgment as to the probable importance of a particular story to the paper's readership, and a technical judgment as to the best placement of the story in the news section so as to insure that the story comes to the readers' attention." *Bulletin Company*;⁶¹ Accord, *The Washington Post Company*;⁶² *The Scranton Tribune*.⁶³ (editor's authority to check, correct, rewrite, or even kill stories and to determine the content and layout of part of the paper does not demonstrate managerial status). Accordingly, Sullivan's role in journalistic decision-making cannot form the basis of a managerial finding.

Two circuit court cases cited by WMTW do not warrant a different result. In *Wichita Eagle & Beacon Publishing Co. v. NLRB*⁶⁴ and in *Walla Walla Union-Bulletin, Inc. v. NLRB*,⁶⁵ the courts overturned the Board's determinations that two editorial writers and an editorial editor at a newspaper were not managerial employees. I note, at the outset, that I am bound by the decisions of the Board rather than those of the courts,⁶⁶ and that the Board has found the editorial writers in those cases and others to be nonmanagerial employees. *Wichita Eagle & Beacon Publishing Co., Inc.*;⁶⁷ *Walla Walla*

⁶¹ 226 NLRB 345, 359 (1976).

⁶² 254 NLRB 168, 220 (1981).

⁶³ 294 NLRB 692, 693 (1989).

⁶⁴ 480 F.2d 52 (10th Cir. 1973), cert. denied 416 U.S. 982 (1974).

⁶⁵ 631 F.2d 609 (9th Cir. 1980).

⁶⁶ The Board has long maintained that it is not bound by the decisions of the circuit courts except in the circuit where the case originated, unless the Supreme Court addresses the issue. *Washington Nursing Home*, 321 NLRB 366 (1996), citing *Waco, Inc.*, 273 NLRB 746, 749 (1984); *Iowa Beef Packers*, 144 NLRB 615, 616 (1963).

⁶⁷ 199 NLRB 360 (1972).

Union-Bulletin, Inc.;⁶⁸ *Bulletin Company*.⁶⁹ In any event, the circuit court decisions are distinguishable. The editorial writers at issue there were responsible for drafting editorials for the editorial pages of their newspapers, which propounded the views of their publishers. As noted by the Tenth Circuit in the *Wichita Eagle* case, “the editorials of [a] newspaper function as the voice of [the newspaper’s] ownership and management.”⁷⁰ The court found that there is “a distinction between the reporting of news and the creation and expression of subjective opinion on behalf of a newspaper. To hold that a person who was involved in the formulation of editorial content of a newspaper is not aligned with the newspaper’s management would come perilously close to infringing upon the newspaper’s First Amendment guarantee of freedom of the press.”⁷¹ As the assignment manager at issue here is involved in the reporting of news rather than in publicizing WMTW’s subjective opinions, I find these cases to be inapposite.

To the degree WMTW relies on Sullivan’s responsibilities in areas other than purely journalistic matters, I find that WMTW has failed to establish that Sullivan has actually formulated and implemented policies herself or that she recommended any policies and that her recommendations were followed. The Board has held that the retention of ultimate authority by a superior does not, by itself, preclude a finding of managerial status, but in order to demonstrate such status, there must be evidence that the individuals in dispute either take direct action in formulating and effectuating management policy or instruct others to do so and/or that their policy recommendations are followed. *Third Coast Emergency Physicians, P.A.*⁷² See also, *Lemoyne-Owen College*,⁷³ in which the Board held that faculty who make or effectively recommend certain decisions are managerial employees [emphasis supplied].

Here, there is evidence that Sullivan participates in meetings with superiors in which they discuss strategy issues such as the most effective way to use a partnership with certain Maine newspapers, how to achieve cross-promotion with some Maine radio stations, or whether to use the WMTW website as a medium for breaking news rather than as a medium to report the TV news. Assuming that these are non-journalistic policy matters, there is no record evidence that Sullivan has made any particular recommendation as to any of these issues, much less that her recommendations were followed. Nor is there any evidence that her role in responding to viewer e-mails,

⁶⁸ 239 NLRB 152 (1978).

⁶⁹ Supra at 356-358.

⁷⁰ Supra, 480 F.2d at 54.

⁷¹ Supra, 480 F.2d at 56.

⁷² 330 NLRB 756 (2000).

⁷³ 345 NLRB No. 93, slip op. at 7 (Sept. 30, 2005).

representing WMTW on the Courts and the Media Committee, or managing the storm closing data base has ever required her to formulate or recommend any policies.

In support of its position, WMTW cites *Bulletin Company*,⁷⁴ in which the Board found that a newspaper's associate editor was a manager, where he was responsible for recommending changes in coverage, personnel, and operating procedures for the newspaper's metro section, attended the daily meetings of department heads, and chaired the meetings in the executive editor's absence. WMTW also cites *The Washington Post Company*,⁷⁵ in which the Board found a newspaper's special projects editor to be a manager on the basis of his responsibility for a project to study the newspaper's Style section, which encompassed proposals to revise the Style section and might lead to significant changes in the department. I find these cases distinguishable, however. Thus, in *Bulletin Company*, among other things, the manager in question (Lewis) had the responsibility for effectuating the employer's decision to upgrade its metro operation, while in *The Washington Post Company*, among other things, the manager in question (Smith) was responsible for a project to study the Style section and come up with proposals to revise it that would result in significant changes. By comparison, here Sullivan does not enjoy the same degree of responsibility. Rather, at best, she participates in discussions with her superiors concerning such matters.

WMTW asserts that Sullivan is a manager by virtue of her authority to authorize use of the satellite truck to cover stories or to install telephone lines and risers on election night. The Board has found managerial status when an individual possesses substantial unreviewed discretion to commit large amounts of the employer's credit. *Concepts & Design, Inc.*⁷⁶ (purchasing/inventory controller who made purchases amounting to approximately two million dollars in the preceding year is a manager). I decline to find that Sullivan is a manager on this basis in the absence of any evidence as to the amounts of money she actually committed or is authorized to commit on her own.⁷⁷ I also note that Sullivan did not determine on her own to send the satellite truck, as Matz testified that she discussed the matter with Hammond.

Finally, WMTW asserts that Sullivan is a manager because she has been labeled as a manager, because she had prior managerial experience, because she was assigned to take the manager's version of workplace harassment training, and because she receives a "management" salary and benefits. Job titles do not control determinations of managerial status, the test of which is the employee's actual job responsibility, authority, and

⁷⁴ Supra, 226 NLRB at 358-359.

⁷⁵ Supra, 254 NLRB at 206-207.

⁷⁶ 318 NLRB 948, 956-957 (1995), enfd. 101 F.3d 1243 (8th Cir. 19996).

⁷⁷ The record reveals only that use of the satellite truck required costs in unspecified amounts for overtime, higher fuel costs, and charges for satellite time, and there no evidence as to the cost of the phone lines or risers.

relationship to management. *NLRB v. Bell Aerospace Co.*⁷⁸ I find that these factors, analogous to secondary indicia of supervisory status, are insufficient to establish managerial status in the absence of evidence that the assignment manager possesses true managerial authority.

Accordingly, having found that Sullivan is neither a supervisor nor a manager, clarification of the unit to include the assignment manager position is appropriate.

CLARIFICATION

IT IS HEREBY ORDERED that the collective-bargaining unit represented by the Petitioner be clarified to include the position of assignment manager.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by March 29, 2006. You may also file the request for review electronically. Further guidance may be found under E-Gov on the National Labor Relations Board web site: www.nlrb.gov.

/s/ Rosemary Pye

Rosemary Pye, Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 16th day of March, 2006.

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⁷⁸ 416 U.S. 267, 290 n. 18, 94 S.Ct. 1757, 85 L.R.R.M. 2945 (1974).